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NTSB Order No. EA-3597

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 3rd day of June, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

JOSEPH H. ZINGALI,

Respondent.

Docket

SE-8968

OPINION AND ORDER

Respondent has appealed from an initial decision that Administrative Law Judge Jerrell R. Davis issued on April 24, 1989, at the conclusion of an evidentiary hearing.¹ The law judge affirmed an order of the Administrator (complaint) charging respondent with violations of the Federal Aviation Regulations ("FAR", 14 CFR), Specifically, sections 91.90(a)(1)(i), operation within the Los Angeles terminal control area (TCA) without appropriate authorization, 91.75(b), operation in an area where

¹A copy of the initial decision, an excerpt from the transcript, is attached.

air traffic control (ATC) is exercised, contrary to an ATC instruction, and 91.9, careless or reckless operation,² and suspending his commercial pilot certificate for 90 days.

The law judge rejected respondents affirmative defense; specifically, that his TCA incursions resulted from a malfunctioning avionics system occurring during flight caused him to lose his frame of reference.³ Finding neither extenuating

² At the time of the event out of which these charges arose (May 15, 1987), FAR sections 91.90(a)(1)(i), 91.75(b), and 91.9 read:

"§91.90 Terminal control areas.

(a) Group I terminal control areas.

- (1) Operating rules. No person may operate an aircraft within a Group I terminal control area designated in part 71 of this chapter except in compliance with the following rules:

- (i) No person may operate an aircraft within a Group I terminal control area unless he has received an appropriate authorization from ATC prior to the operation of that aircraft in that area.

§91.75 Compliance with ATC clearances and instructions.

- (b) Except in an emergency, no person may, in an area in which air traffic control is exercised, operate an aircraft contrary to an ATC instruction.

§ 91.9 Careless and reckless operation.

no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property or another."

³ Respondent testified to an intermittent failure that was identified and corrected more than one year after the operation out of which these allegations arose. His affirmative defense was intended to explain both his failure to respond to ATC before canceling his IFR flight plan and his loss of his frame of reference, due, he claims, to a malfunctioning HSI (Horizontal Situation Indicator), off by 15 degrees to the right.

nor mitigating circumstances, the law judge affirmed the sanction the Administrator imposed, a 90-day suspension of respondent's commercial pilot certificate, citing the Muzquiz standard, i.e. , the lack of "clear and compelling" reason warranting a reduction.⁴

After reviewing the record in light of the briefs, the Board has decided to affirm the initial decision. We agree with the law judge that respondent's evidence to support his affirmative defense was insufficient to establish that his avionics equipment was malfunctioning on the date of the event in question.

Briefly stated, the facts establish that respondent made a takeoff from Torrance, an airport south of Los Angeles and under the Los Angeles TCA. Because of low visibility, respondent had opened an IFR flight plan for VFR on top and had notified the controller that he planned to use the VFR corridor. Emerging from the obscuration at 2500 feet, respondent had not yet entered the TCA. He cancelled his IFR flight plan and received from the controller the following transmission:

" . ..squawk 1200... your radar service is terminatedturn southbound [left] remaining clear of the Los Angeles TCA", and, 17 seconds later,

⁴ The law judge made a factual finding that respondent's unauthorized entry into the Los Angeles TCA was inadvertent error; a factor he deemed not exculpatory. The law judge found respondent's affirmative defense inconclusive, unpersuasive, and unconvincing. He determined that respondent's unauthorized entries were due to respondent's loss of his frame of reference in respect to his location and found that such loss of reference was careless.

"start a left turn now." ⁵

Respondent did not comply; but, instead, turned right in an attempt to locate the VFR corridor.

Respondent contends that he produced evidence sufficient to substantiate his affirmative defense, and it was, therefore, incumbent upon the Administrator to rebut that defense. We disagree.

The Administrator is not required to rebut an affirmative defense when he has established a prima facie case. See Administrator v. Sidicane, 3 NTSB 2447, 2449 (1980), aff'd at 698 F.2d 1223 (6th Cir. 1982).⁶ Moreover, a law judge does not need rebuttal evidence to conclude that the evidence submitted by a party in support of an affirmative defense is inadequate. In this instance, the law judge found that respondent's affirmative defense was,

".... based upon hearsay remote in time from the date of the incident (May 15, 1987), was found to be too inconclusive or

⁵ Respondent's contention that this transmission was only advisory is without merit, as it focuses only on the "sorts turn" part of the transmission. We therefore have no need to rule on whether he was obligated to comply with an advisory concerning an appropriate heading once he was no longer operating IFR.

⁶ Respondent cites Administrator v. Cody, 3 NTSB 3807, 3809 (1981). However, in contrast to the circumstances in Cody, in this instance the Administrator is not relying on the Lindstam Doctrine, i.e., an inference that carelessness was the causal factor absent other explanation. In this instance, it was conceded that respondent entered the TCA without an appropriate authorization from ATC; hence, his affirmative defense must be evaluated on its own merits rather than as a possible alternative to an inference of careless operation. See, also, Administrator v. Godwin, Order EA-3017 (1989), a case that dealt with an affirmative defense of intermittent, spontaneous, equipment malfunction.

without sufficient probative value to be convincing or persuasive." (ID at 178).

The law judge made this finding, not exclusively in his initial decision, but in connection with respondent's motion for a continuance, made at the outset of the hearing.

The Board has reviewed the evidence of record in support of respondent 's affirmative defense (Exh. R-4, records of repairs made in September and October of 1988, together with respondent's explanation of their meaning, Tr. 101-118), and we agree that these repairs are too remote in time to be persuasive as to why respondent may have lost his frame of reference with respect to the location of the TCA on the day in question. We agree with the law judge's rejection of the affirmative defense.

Turning now to the matter of sanction, the Board agrees with the Administrator that a 90-day suspension is consistent with precedent. While inadvertent TCA incursions unaccompanied by aggravating factors generally have drawn 60-day suspensions, see, for example Administrator v. Pritchett, NTSB Order No. EA-3271 (1991), this is not such a case. To the contrary, respondent's section 91.90(a)(1)(i) violation stemmed from his decision to disregard, in violation of section 91.75(b), an ATC instruction to turn left to avoid the TCA.⁷

⁷ The Administrator accurately characterizes respondent's conduct, in brief, in the following language:

"As a direct result of his failure to obey an ATC instruction, respondent twice entered the Los Angeles TCA without authorization."

ACCORDINGLY , IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The Administrator's order and the initial decision are both affirmed.⁸

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁸ For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the Federal Aviation Administration pursuant to FAR section 61.19(f).